SUBJECT INDEX.

	PAGE
I. Concise Statement of Facts	2
II. Jurisdiction	3
III. The Question Presented	4
IV. Reasons for Denying the Writ	4
1. Petitioner's Reasons for Allowance Not Supported by the Evidence	4
2. Findings of Fact and Conclusions of Law Fully Supported by the Evidence	7
V. Argument	8
1. The Court of Appeals Did Not Deny Petitioner Any Remedy to Which It Was Entitled	8
2. Petitioner Failed to Prove Any Likelihood of Confusion	9
3. The Court of Appeals Was Correct in Not Considering the Lady Esther Case	12
4. A Man Always Has the Right to Use His Own Name in His Own Business in a Manner Which Is Not Deceptive	13
5. The Decision of the Court of Appeals Is Not in Conflict with the Trade Mark Statute, the International Conventions, the Law of Illinois, nor the Decisions of Other Circuits	15
6. The Decision of the Court of Appeals Is Not Injurious to the Good Will Inherent in Trade Marks	16
7. Concurrent Findings of Fact by Two Courts Ordinarily Not Reviewed	16
8. Additional Authorities in Support of Respondent's Contention	17
VI. Conclusion	17

TABLE OF AUTHORITIES CITED.

Cases.

Brown Chemical Co. v. Meyer, 139 U. S. 540.....9, 14, 15
California Fruit Growers Exchange v. Sunkist Baking Co., 166 F. (2d) 971..... 17
Coca-Cola Co. v. Snow Crest Beverages, Inc., 332 U. S. 809 (C. C. A. 1, 162 F. (2d) 280).....1, 3, 17
Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co., 69 S. Ct. 535.....1, 16
Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118..... 14
Lady Esther, Ltd. v. Lady Esther Corset Shoppe, Inc., 317 Ill. App. 451.....5, 12, 13
Morrell, John & Co. v. Boyd W. Doyle, et al., 97 F. (2d) 232 11
Philco Corporation v. F. & B. Mfg. Co., 76 U. S. P. Q. 226 7
Philco Corporation v. F. & B. Mfg. Co., 170 F. (2d) 958 .....7, 14
Quaker Oats Co. v. General Mills, Inc., 134 F. (2d) 429 17
Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169....9, 14, 15
Taylor Instrument Companies v. Fawley-Brost Co., 139 F. (2d) 98..... 17
Waterman v. Gordon, 72 F. (2d) 272.....7, 15
Waterman v. Modern Pen Co., 235 U. S. 88.....6, 14
Yale Electric Corporation v. Robertson, 26 F. (2d) 972 .....7, 16

Statutes.

Judicial Code, Sec. 240 (28 U. S: C. 347)..... 3
Trade Mark Act of 1905 (15 U. S. C. 81 et seq.)..4, 6, 8, 9, 14
Trade Mark Act of July 5, 1946 (15 U. S. C. 1051 et seq.) 15 U. S. C. 1114.....3, 4, 6, 8, 9, 14
46 Stat. 2907..... 5

Rules.

Rules of the Supreme Court of the United States:
Rule 38, Par. 5..... 1
Federal Rules of Civil Procedure:
Rule 52(a) 7, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 596

PHILCO CORPORATION,

Petitioner,

vs.

F. & B. MFG. CO.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petition for a Writ of Certiorari should be denied because: (a) The case relates only to an ordinary trade-mark infringement suit; (b) It does not involve any of the important and special reasons for granting a Writ of Certiorari as provided by the Rules of the Supreme Court of the United States (Rule 38, par. 5); (c) The Supreme Court has already had before it at least one case involving the Trade-Mark Act of July 5, 1946, in *Coca-Cola Co.* v. *Snow Crest Beverages, Inc.*, 332 U. S. 809 (Certiorari denied Oct. 27, 1947); (d) The case involves concurrent findings of fact by two courts below and should not be reviewed, as held in *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 69 S. Ct. 535.

I.

CONCISE STATEMENT OF FACTS.

The original Bill of Complaint in this case was filed in the United States District Court for the Northern District of Illinois, Eastern Division, on August 9, 1945, entitled "Philco Corporation, Plaintiff *vs.* John Filko and Harold Rapp, d. b. a. F. & B. Manufacturing Co., Defendants, Civil Action No. 45 C 1343" (R. 2). John Filko, one of the original defendants herein, started business in Chicago in 1923, and at that time had a partner named Steve Bohm. The partnership remained in force until 1926 (R. 143) whereupon John Filko became the sole owner and proprietor of the entire business. John Filko started using his own name, in his own business, in the style of "filko" as a trade name in the year 1935 (R. 155). John Filko used his own name as a mark to designate his own goods in his own business of which he was the sole owner. In 1937 John Filko took in another partner, Harold Rapp, and continued the use of that mark under the partnership with Mr. Rapp (R. 143).

In June, 1946, the latter partnership incorporated, and John Filko became, and still is, the president of the corporation (R. 142, 143). It was not until March 12, 1947, that an amended Bill of Complaint was filed by the Petitioner herein against the corporation (R. 2) which was more than *twelve years* after the time John Filko started to use his own name in his own business, and more than *one and one-half years* after the original complaint was filed.

The business carried on by John Filko as the sole owner, the business carried on by the subsequent partnership, and the business carried on by the company which was incorporated in June, 1946, consisted in making metal stampings

and in making replacement parts for automobile ignition systems (R. 144, 188). These goods are different from the radio, refrigeration and television parts made by the Petitioner.

Petitioner has continuously referred to wrenches made by the Respondent. Such few wrenches as may be made by the Respondent are merely stampings. The record is completely devoid of any reference to whether or not these wrenches carry Respondent's mark. Actually, however, these devices do not carry any mark at all (R. 150).

John Filko was fifty-four years old at the commencement of the trial (R. 141). Filko has always been the family name, and John Filko has spelled it the same way since he was born (R. 142). Petitioner's earliest use of the mark "Philco" was in 1919, *twenty-six years* after John Filko was born.

II.

JURISDICTION.

The jurisdiction of this Court is based primarily upon Section 240 of the Judicial Code (28 U. S. C. Sec. 347). Petitioner asserts that the issue here involves the construction of the remedial section of the Federal Trade Mark Act of July 5, 1946 (15 U. S. C. 1114 (1)).

Petitioner, on page 6 of the petition states:

> "This is the first time this new trade-mark act has been before this Court for construction."

This assertion is incorrect because the Supreme Court already has had before it for consideration this same Trade Mark Act of 1946 in *Coca-Cola Company* v. *Snow Crest Beverages, Inc.*, 332 U. S. 809, wherein certiorari was denied on October 27, 1947.

Whether the remedial section of the Act of July 5, 1946, or the former Trade-Mark Act of 1905 (15 U. S. C. 96) is invoked makes no difference as far as the facts in this case are concerned.

III.

THE QUESTION PRESENTED.

Since John Filko was one of the original defendants in this case, and since he adopted his own *surname* as an identifying mark for his own goods at the time he was conducting his own business by himself as a sole owner and later in the partnership for ten years, and later in the present corporation, there appears to be only one question to decide and that question is:

> "May a man innocently acting in good faith fairly and honestly adopt and use his own name in a manner not calculated to deceive in conducting a useful, honest and legitimate business?"

IV.

REASONS FOR DENYING THE WRIT.

1. Petitioner's Reasons for Allowance Not Supported by the Evidence.

(1) Petitioner complains, as its first reason for allowing the writ, that it has been denied the remedies afforded the owner of a registered trade-mark for infringement by colorable imitation of the mark under Section 32 of the Federal Trade Mark Act of 1946 (15 U. S. C. 1114) which provides relief against the use of an *infringing mark which is calculated to cause confusion or mistake or to deceive purchasers as to the source of origin* of the infringer's goods. This assertion, however, presupposes infringement

as well as the existence of confusion or deception of purchasers. Both the U. S. District Court (R. 337) and the U. S. Court of Appeals for the Seventh Circuit (R. 364) found that the Petitioner had not proved any confusion or deception, and held that Respondent's use of his own name did not infringe Petitioner's registered trade-marks. Therefore, the remedy provided by either the 1905 Act or the 1946 Act cannot be considered to have been denied.

(2) The decision of the Court of Appeals gave to Petitioner all the protection to which it was entitled under its registered trade-marks, since the owner of a trade-mark cannot prevent the use by an individual of his own surname in an honest and legitimate manner.

(3) The Court of Appeals affirmed the lower court and held that there was no misappropriation of Petitioner's trade-marks. These courts correctly found that there was neither a misappropriation nor a misrepresentation resulting from the use by Respondent of the individual surname of one of the original defendants.

(4) Whether or not Petitioner and Respondent are in actual competition is of no moment in this case because Respondent's mark is that of a surname of one of the *original defendants* which Respondent is entitled to use. Therefore, this case does not come within the holding of *Lady Esther, Ltd.* v. *Lady Esther Corset Shoppe, Inc.*, 317 Ill. App. 451, upon which the Petitioner seems to rely.

(5) The decision of the Court of Appeals is not in conflict with the General Inter-American Convention for trade-mark and commercial protection (46 Stat. 2907) since this Convention does not refer to the use of a personal name.

(6) At the time John Filko first used his own surname as an identifying mark for his own goods in 1935, he was the sole proprietor of his own business. At the time this suit was brought it was against John Filko and Harold Rapp,

doing business as F. & B. Manufacturing Co., and therefore the facts are contrary to Petitioner's allegations on page 9 of its petition that the mark or name "filko" was the surname of "one of the respondent's officers", or "a person connected with the infringer", or "someone connected with the infringer".

The U. S. Court of Appeals for the Seventh Circuit held that Respondent had the right to use the name "filko" as a trade-mark because that was John Filko's own name which he began using when he was in business for himself. Neither the Trade Mark Act of 1905 nor the Act of 1946 makes any specific provision with respect to personal surnames, neither condoning nor prohibiting the use of such name. The law with respect to the use of personal names as trade-marks is an outgrowth of judicial determination and the courts have always held, and still hold, that a man has the right to use his own name in his own business as long as he uses it in such a way that does not cause confusion or deception in the trade.

(7) There are no cases which have ever prohibited a man from using his own name in his own business where that use was honest and fair and without any deceptive intent or purpose. Contrary to Petitioner's statement on page 9 of its petition, the cases relied upon by Respondent *were not* specifically overruled by this court in *Waterman* v. *Modern Pen Co.*, 235 U. S. 88.

(8) The decision of the Court of Appeals for the Seventh Circuit is in complete accord with decisions of other Circuits where similar circumstances prevailed with regard to the use of a personal surname. Petitioner cites several cases on pages 10 and 11 of its petition from other Circuits where the use of infringing marks were enjoined. Not one of these cases enjoined the use of a personal surname.

The marks AUNT JEMIMA, SEVENTEEN, and VOGUE, involved in the cases cited by Petitioner, are not personal names.

In *Yale Electric Corporation* v. *Robertson*, 26 F. (2d) 972, cited by Petitioner, the party against whom the injunction issued prohibiting the use of the word "Yale" had no one connected with it by the name of Yale.

Likewise in *Waterman* v. *Gordon*, 72 F. (2d) 272, also cited by Petitioner, there was no one by the name of "Waterman" connected with defendant.

The law is well settled that a man may use his own name in his own business as an identifying mark for his own goods when such use is honest, fair and legitimate and where there is no confusion or deception. There are no cases to the contrary, and Petitioner has cited none.

2. Findings of Fact and Conclusions of Law Fully Supported by the Evidence.

The District Court entered Findings of Fact and Conclusions of Law and Final Judgment on June 26, 1947, in favor of the defendant (R. 332-335), 76 U. S. P. Q. 226.

The Court of Appeals for the Seventh Circuit found the Findings of Fact supported by the weight of the evidence and affirmed the judgment of the District Court on December 3, 1948 (R. 364), 170 F. (2d) 958, and thus followed Rule 52(a) of the Federal Rules of Civil Procedure, which reads in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

V.

ARGUMENT.

1. The Court of Appeals Did Not Deny Petitioner Any Remedy to Which It Was Entitled.

Irrespective of whether the Trade-Mark Act of 1905, or the Trade-Mark Act of 1946, is applicable here, Petitioner would be entitled to a remedy, such as an injunction under the Act of 1905, only if Respondent colorably imitated Petitioner's mark and affixed the same "to merchandise of substantially the same descriptive properties as those set forth in the registration"—or under the Act of 1946, only if Respondent colorably imitated Petitioner's mark and wherein such use of the mark was "likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods".

The District Court and Court of Appeals both recognized the obvious differences between the goods, the class of purchasers, the manner of advertising, and manner of packaging of the respective parties and, therefore, held that the Petitioner was not entitled to any relief whatsoever. Furthermore, both these courts recognized that Petitioner failed to prove any confusion or palming off and, therefore, Respondent's use of the mark was not likely to cause confusion, or mistake, or to deceive purchasers as to the source of origin of such goods. The District Court made this holding under the Act of 1905, and the Court of Appeals made the same holding under the Act of 1946.

As a further consideration, both courts recognized the right which a man has to use his own name in his own business to identify his own goods, and that any injury which might be caused to others as a result of the honest and fair

use of a man's own name would be *damnum absque injuria. Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169.

The law of trade-marks with respect to the use of a man's own name has grown up as an exception to the general law of trade-marks under the Acts of 1905 and 1946. Neither Trade-Mark Act makes any specific provision as to the use of a man's own name in his own business either condoning or prohibiting it. Therefore, the law must be held to be the same now as it was before either of the Trade-Mark Acts were passed.

Had it been the intent of Congress to change this law, the Act of 1946 would have specifically provided that the remedial section applies with equal force to all trade-marks whether or not they be personal surnames. No such provision was made in either of the Trade-Mark Acts, and therefore, a personal name assumes a peculiar place in the trade-mark law not applicable to arbitrary marks.

2. Petitioner Failed to Prove Any Likelihood of Confusion.

Respondent manufactures automotive ignition parts for replacement purposes only. These parts were defined by the witness John Filko as being:

> "Stationary and movable electrical parts in the automobile that force the current, the electricity into the engine for their force." (R. 141).

Petitioner's goods are not automotive ignition replacement parts. Respondent sells no parts to automobile manufacturers or dealers which are used as original new equipment, but sells only *replacement* parts (R. 157, 188). Respondent does not handle or deal in radios or radio parts. The only parts Petitioner makes which can be used in an

automobile are for the automobile radios. Respondent's goods are not for radios and cannot be used for radios. Petitioner's goods cannot be used in an automobile ignition system (R. 153).

The diagram on Page 5 of Petitioner's Brief, (Pet. Ex. 82) is merely a hypothetical illustration of what may be done provided such a circuit were used in new original equipment. Respondent makes no original equipment but only *replacement* parts for ignition systems, and never sells to automobile manufacturers. The attempt of the witness Nichol in preparing Exhibit 82 has utterly failed and is not in point. The hook-up illustrated in Exhibit 82 never did exist, no one has used such a system, and such a system could never possibly become an actuality.

Petitioner asserts, on page 15 of its petition, that the likelihood of confusion was proven by the psychology professor Norman C. Meier and the witness L. W. Stratton. The testimony of the psychologist Meier can be summarily dismissed for two reasons. The tests which he conducted were confined to his classroom and he merely tested the reactions of students (R. 68) in an age group from 21 to 26 (R. 65). This was a select group of a comparatively few members of a specific class and was not a representative cross section of the United States or the purchasing public.

Furthermore, the opinion of Professor Meier in this case, who was "on the Advisory Board of the American Institute of Public Opinion, commonly known as the Gallup Poll" (R. 61), is no better than his opinion in the election of November, 1948.

The little value of the witness Stratton's testimony may be recognized by his statement that the store of which he was manager did not carry a line of ignition or replacement parts for automobiles (R. 113). He also expressed his opinion as an expert that the marks RED HEART and STRONG

HEART for dog food would be confusingly similar, but this opinion is contrary to the opinion of the Court of Appeals for the Seventh Circuit in *John Morrell & Co.* v. *Boyd W. Doyle, et al.*, 97 F. (2d) 232, in which those two marks were involved.

Petitioner attempted to show actual confusion and a passing off of "filko" products on written orders for "Philco" products, but the Court of Appeals correctly held that the character of this evidence was insufficient to show any confusion.

Petitioner attempted to prove confusion by having professional investigators make purchases. These investigators significantly went only to dealers who did not carry radio parts or any other parts manufactured by the Petitioner, but rather went to dealers who deal exclusively in replacement repair parts for automobile ignition systems. In three instances, women presented to the dealer a written slip of paper asking for a "Philco" condenser or a "Philco" coil, both for a 1941 DeSoto (R. 117, 125, 129). In all instances these women were given "filko" condensers and a "filko" coil because the dealer in each case was well aware of the fact that the Philco Corporation does not make condensers or coils for automobiles.

In one instance one of Petitioner's investigators asked for "filko" brushes (R. 132) and was given "AMPCO" brushes, made by American Motor Products Co. In another instance when an investigator asked for a "Philco" condenser (R. 129) he returned with a product made by the Standard Motor Products Company (R. 165). These two companies are competitors of Respondent (R. 164, 165).

The investigators which the Petitioner employed in this case were Lampa & Christopherson, a firm of professional investigators (R. 114) and the Pinkerton National Detective Agency (R. 128). Naturally, if it required the Pinker-

ton National Detective Agency and the professional investigating firm of Lampa & Christopherson to obtain a part asked for under another name, then of course it is clearly indicative that there is neither actual confusion nor any likelihood of confusion. Moreover, each party got what he wanted and was not confused.

Respondent does not make, sell, handle or otherwise deal in any parts which are made, sold, handled or dealt in by Petitioner (R. 182, 212).

Respondent does not manufacture, sell or otherwise handle any of the items listed in any of Petitioner's trade-mark registrations (R. 213, 214).

The witness Steinruck, who is the secretary of the Petitioner Philco Corporation, was handed a list of all the goods made by it and was asked to name the parts manufactured by Petitioner which could be called automotive ignition parts. The only item which he could mention as coming closest to this classiffication was a hydrometer syringe (R. 54), which of coursse has no relation to, and is not a part of, an automotive igmition system.

The Court of Appeals in view of this evidence was clearly justified in holding that there was no likelihood of confusion as to the source of origin of Respondent's products.

3. The Court of Appeals Was Correct in Not Considering the Lady Estther Case.

The original claim of unfair competition by Petitioner has been abandoned and was abandoned before the Court of Appeals.

Petitioner's brief on page 17 discusses the case of *Lady Esther, Ltd.* v. *Lady Esther Corset Shoppe, Inc.*, 317 Ill. App. 451, which it maintains the Court of Appeals should have considered but did not. This case relates to the law of unfair competition.

The original Bill of Complaint asserted that the use of Respondent's mark on its goods was likely to produce confusion and was likely to cause Respondent's goods to be passed off as the goods of Petitioner, and therefore such use constituted unfair competition (R. 5). It is to be noted that the allegation of the complaint relates to the *likelihood* of confusion and the *likelihood* of passing off but does not allege any actual passing off.

When Petitioner appealed to the Court of Appeals, this phase of unfair competition was omitted, and nowhere in its brief before the Court of Appeals did Petitioner object that there had been no finding of unfair competition.

The District Court held, and the Court of Appeals affirmed the holding, that the original complaint did not allege actual confusion or palming off, and in any event none had been proved. Since Petitioner abandoned its assertion of unfair competition before the Court of Appeals, it cannot now re-assert this phase of the action, regardless of the law. The *Lady Esther* case, *supra*, in any event is not pertinent.

4. A Man Always Has the Right to Use His Own Name in His Own Business in a Manner Which is Not Deceptive.

In the first paragraph on page 19 of its brief Petitioner has misstated the position of the Court of Appeals with respect to the name "Filko". Petitioner states that the position of the Court of Appeals was that Defendant had the right to use the name "Filko" as a trade-mark "because it is the name of one of Defendant's officers". The Court of Appeals was not misled by Petitioner's statement that "Filko" was the surname of one of Defendant's officers. The Court of Appeals recognized that Filko employed his own name for many years as designating the

ignition repair parts which he made. At one point in the opinion the Court of Appeals stated (170 F. (2d) 958, 961):

> "It should be observed in this connection that the use of one's name in his business is proper unless it is so used as fraudulently to cause likely injury to his competitor." (R. 369.)

And again later in the opinion the Court of Appeals noted:

> "For many years last past, Filko has employed his name as designating the name of his ignition repair parts." (R. 369.)

The cases relied upon by Respondent and followed by the Court of Appeals include *Brown Chemical Company* v. *Meyer*, 139 U. S. 540; *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169; and *Howe Scale Company* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118. Petitioner complains that these are all old cases decided prior to the passage of the Trade-Mark Act of 1905. This is immaterial because, as pointed out above, neither the Trade-Mark Act of 1905 nor the Trade-Mark Act of 1946 specifically condones or prohibits the use of a man's own name in his own business as an identifying mark for his own goods. Neither of the Trade-Mark Acts changes the law in this respect from what it has always been and still is.

Petitioner asserts that these earlier cases were specifically overruled by this court in *Waterman* v. *Modern Pen Co.*, 235 U. S. 88. This is not true. Petitioner erroneously asserts that the law now holds that a man may not use his own name in his own business if it is similar in any respect to a registered trade-mark owned by another.

The *Waterman* case, *supra*, holds in effect that if a man uses his name as an identifying mark for his own goods, and that use leads the public to understand that those goods are the product of a concern already established, then the owner of such name must take reasonable precau-

tions to prevent confusion. This case did not prevent Waterman from any use of that name, but merely required him to take reasonable precautions, by the addition of certain words, to prevent any fraud. Even in that case the court still permitted the use of the name "Waterman".

Petitioner also relies upon certain provisions of the General Inter-American Convention for Trade-Mark and Commercial Protection and of the Union Convention preventing the use of similar marks "calculated directly or indirectly to represent that the goods or business of a manufacturer * * * are the goods or business of another manufacturer * * *." The present case is also outside the scope of these provisions because it was clearly proven by Respondent that the use of the mark "filko" was not calculated in any way to deceive anyone.

5. The Decision of the Court of Appeals Is Not in Conflict with the Trade-Mark Statute, the International Conventions, the Law of Illinois, nor the Decisions of Other Circuits.

It has already been pointed out that the Court of Appeals affirmed the decision of the District Court to the effect that, because the trade-mark "filko" was the surname of John Filko, and was used by him in a fair and honest manner to identify his own goods, there was no likelihood of confusion. Therefore, were there any injury to Petitioner (although the court found that there was not) it would come within the doctrine of *damnum absque injuria*. (*Brown Chemical Co.* v. *Meyer*, and *Singer Mfg. Co.* v. *June Mfg. Co.*, both *supra.*)

The Court of Appeals decision is not in conflict with any decisions of other circuits. In making the assertion that there is a conflict, Petitioner relies upon *Waterman* v. *Gordon*, 72 F. (2d) 272, "wherein the use of the name

Waterman was enjoined on razor blades". It is interesting to note that in this case *there was no one connected with the defendant by the name of "Waterman"*, so that the injunction was not against the use of a man's own name in his own business.

The case of *Yale Electric Corporation* v. *Robertson*, 26 F. (2d) 972, was also relied upon by Petitioner to show that the use of the trade-mark YALE on flashlights and batteries was enjoined. Again it is noted that there was no one by the name of "Yale" connected with Yale Electric Corporation, and again the case does not relate to the use of a man's own name to identify his own goods.

6. The Decision of the Court of Appeals Is Not Injurious to the Good Will Inherent in Trade-Marks.

Petitioner complains that if the Court of Appeals opinion is permitted to stand it will greatly diminish if not destroy the existing good will in trade-marks. There is an even greater amount of good will in a man's own name when used as an identifying mark for his own goods, and if a man is prevented from using his own name in a fair, honest and legitimate manner merely because another party adopts as its trade-mark a coined word similar to a surname which someone else had first, then it will destroy the fundamental legal right which everyone has in the use of his own name.

7. Concurrent Findings of Fact by Two Courts Ordinarily Not Reviewed.

The Court of Appeals for the Seventh Circuit found that the findings of fact are based upon evidence produced before the trial court. Findings of Fact will not be set aside unless clearly erroneous, as set forth in Rule 52(a) of the Federal Rules of Civil Procedure and as mentioned in the Supreme Court case of *Graver Tank & Mfg. Co.*,

Inc. v. *Linde Air Products Co.*, decided February 28, 1949, 69 S. Ct. 535. In this case the Supreme Court applied this rule and stated:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

In the present case, the District Court had the opportunity to judge of the credibility of the witnesses. The Court of Appeals made the necessary allowances for the advantages possessed by the trial court in appraising the testimony, and there has been no very obvious and exceptional showing of error.

8. Additional Authorities in Support of Respondent's Contention.

Other cases in point which support Respondent's position but which are not specifically discussed and briefed herein are:

Taylor Instrument Companies v. *Fawley-Brost Co.*, 139 F. (2d) 98.

Coca-Cola Co. v. *Snow Crest Beverages, Inc.*, 162 F. (2d) 280; Cert. den. 332 U. S. 809.

California Fruit Growers Exchange v. *Sunkist Baking Co.*, 166 F. (2d) 971.

Quaker Oats Co. v. *General Mills, Inc.*, 134 F. (2d) 429.

VI.

CONCLUSION.

The law of the Court of Appeals for the Seventh Circuit as decided in this case is no different from the law of any other circuit where similar circumstances have prevailed.

No court has ever completely prevented the use of a man's name in his own business to identify his own goods, particularly where this use has been honest and fair.

Both the District Court and the Court of Appeals held that:

(a) The goods of the Petitioner and Respondent are different;

(b) Respondent does not manufacture, handle, or otherwise deal in any of the goods manufactured by Petitioner;

(c) Respondent makes no original equipment but furnishes only replacement parts for automobile ignition systems;

(d) Petitioner's goods cannot be substituted for any of Respondent's parts, and Respondent's parts cannot be substituted for any of Petitioner's goods;

(e) Petitioner and Respondent use different modes and types of advertising;

(f) Petitioner and Respondent serve different classes of purchasers;

(g) Petitioner did not prove any confusion;

(h) Petitioner did not prove that there was likely to be any confusion;

(i) Respondent had not practiced deception;

(j) There was no competition between the parties.

There are no special or important reasons, and therefore no basis, for the granting of a Writ of Certiorari to the Court of Appeals for the Seventh Circuit. Petitioner's request, therefore, should be denied.

Respectfully submitted,

JOHN A. MARZALL,
LLOYD C. ROOT,
135 S. La Salle Street,
Chicago 3, Illinois,
Attorneys for Respondent.